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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

BERRYMAN HENWOOD, Trustee of the St. Louis Southwestern Railway Company, a Corporation,
Petitioner,

vs.

O. R. CHANEY,
Respondent.

No. 462

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

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Cases Cited.

Statutes Cited.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Berryman Henwood, Trustee of the St. Louis Southwestern Railway Company, a corporation, respectfully shows to the Honorable Court:

STATEMENT OF MATTERS INVOLVED.

This is a suit for damages for personal injuries sustained by respondent when he fell under the wheels of a moving train of cars and was run over and injured. Respondent was a switchman employed by petitioner at his railroad yard in Shreveport, Louisiana. Both parties were engaged in interstate commerce at the time of the injury

on January 1, 1945, and the suit was brought under the Federal Employers' Liability Act, 45 USCA, Title "Liability for injuries to employees," Chapter 2, §51, p. 118, and under the Safety Appliance Act, 45 USCA, Title "Safety appliances and equipment," Chapter 1, §2, p. 18. Suit for $300,000 was filed in the District Court of the United States for the Eastern District of Missouri, Eastern Division.

Trial of the case in the District Court resulted in judgment for respondent for $67,000 (R. p. 12). Petitioner appealed to the Circuit Court of Appeals for the Eighth Circuit, which court affirmed the judgment (R. p. 656), and petitioner brings the case here by this petition for writ of certiorari.

THE FACTS.

Petitioner, as trustee of the St. Louis Southwestern Railway Company, a corporation, was in possession and was managing and operating the St. Louis Southwestern Railway Company, and was in possession of its properties, including the railroad and railroad switch yards in Shreveport, Louisiana. Petitioner was operating the freight train involved and switch yards in Shreveport, Louisiana, in interstate commerce, and respondent was, and for eight years had been, in petitioner's employ as a switchman, both petitioner and respondent being engaged in handling and moving railroad cars in interstate commerce at the time of the occurrence complained of.

On January 1, 1945, about 8:40 o'clock a. m., respondent was acting as "pin-puller," when he received a signal to uncouple two railroad cabooses from a cut of fifteen cars, by operating a pin-lift lever at the end of one of the cabooses which operation pulled or lifted a coupling pin out of the coupling between the cabooses, and permitted the cars to separate. As the cut of cars started to move along the lead track in the railroad yard respondent oper-

ated the pin-lift lever, thereby lifting the coupling pin and permitting the cars to separate, and respondent fell under the wheels of one of the moving cabooses, and sustained injuries which caused him to suffer the loss of his right arm near the shoulder and his right leg near the hip.

The case was tried on respondent's complaint (R. pp. 2-6), which alleged that petitioner (defendant below) negligently and carelessly failed to provide him with a reasonably safe place to work, in that "defendant negligently and carelessly allowed and permitted an accumulation of oil and water alongside the said lead track," and "negligently and carelessly failed properly to maintain his tracks and roadbed, but permitted the same to become unsafe, uneven, and in a dangerous condition, resulting in low joints and an uneven track" (R. p. 4). There was no other charge of negligence. There was a charge of violation of the Safety Appliance Act, in that it was alleged that a certain oil tank car was equipped with a coupling apparatus and pin-lift lever which was in a "defective, unsafe and dangerous condition," and an allegation that said car was not so equipped that it "could be uncoupled without the necessity of men going between the ends of the cars" (R. p. 4), but the District Court instructed the jury that there was no evidence of a defective coupling, "and you should not consider any evidence of that kind in arriving at your verdict" (R. p. 627).

The case was submitted to the jury on the sole theory that oil and mud had been negligently and carelessly permitted to accumulate in and about the place where respondent was working, and that respondent stepped in oil while he was engaged in the operation of uncoupling cars, and was thereby caused to slip and fall under the caboose (R. p. 626). A number of witnesses testified that for several years oil had been permitted to accumulate along the lead track (R. A. Mayberry, R. p. 38; W. T. Arnold, R. pp. 85, 101; J. C. Stout, R. p. 134; C. T. Alexander, R. pp. 187, 190;

W. M. Webb, R. pp. 316, 317; E. M. Robinson, R. pp. 369, 370; Tom Smith, R. pp. 426-427; R. A. Prudhomme, R. p. 439), and respondent testified he was caused to fall by reason of his foot slipping in oil as he ran alongside the cut of cars and pulled the coupling pin (R. pp. 241, 242). No witness other than respondent testified to the presence of oil at the time and place where respondent was injured. J. J. Rains testified he saw something that "looked like oil" where respondent was lying (R. p. 454), but said he could not say whether the substance was oil or smut (R. pp. 456, 461), and that "it could have been anything black" (R. p. 461).

Petitioner contended that respondent did not slip on oil, but that his coat caught on some part of one of the railroad cars and threw him under the car. In support of his contention that there was no oil along the lead track where respondent fell, petitioner introduced several witnesses who testified there was no oil along the lead track, or not a sufficient amount of oil to create a slippery condition where switchmen and pin-pullers were required to work (S. H. King, R. pp. 353-356; J. J. Poe, R. p. 363; Bill Cole, R. pp. 383-384; E. C. Manley, R. pp. 395, 396; J. M. Lee, R. pp. 401-402; W. J. Sorrels, R. pp. 408, 411; W. E. Leath, R. p. 413; Joe Pickering, R. p. 423; W. T. Rippey, R. p. 433; S. S. Barker, R. p. 437; C. D. Mayo, R. pp. 524, 525, 528, 529).

In support of his contention that respondent's coat caught on a car and threw him under the wheels, petitioner produced four witnesses who testified as follows: Bill Cole, switchman and field man in the same crew with respondent at the time of the accident, testified he saw respondent cut off two cars, "and just as quick as the movement of the car was started, the cut was made, and on stepping, that is, when Mr. Chaney started to step away, I saw his coat go out like that and him go under the car * * *" (R. 375). Dr. Carleton L. Harris, house

physician at the hospital where respondent was taken immediately after he was injured, testified he assisted in removing respondent's clothing and "we were removing his clothes and treating him in the emergency room, and he stated that he had on so much clothing until he caught his clothing on the train and slipped under the train" (R. p. 327). Clifford Walker, orderly at the hospital, testified respondent told him "he had on two pair of trousers and a pair of summer shorts, two overshirts, one little—some kind of jacket, I don't recall just what kind it was, and another zipper jacket on there, and also a top coat, leather coat, whatever you might name it, I don't know. Q. What did he say about his clothing? A. He said if it hadn't been for the amount of clothing he had, he might have prevented the accident" (R. p. 335). Dr. Arthur A. Herold, President and general manager of the hospital, testified he talked to respondent in the emergency room; that he asked respondent how the accident happened, and respondent replied, "You know, it was very cold out there this morning, and I had on lots of coats, my own outer coat and hunting jacket, and the coat caught in some way on one of the cars and jerked me under" (R. p. 444). Dr. Harris testified he did not hear respondent say anything about slipping on oil (R. p. 334), and Dr. Herold testified respondent did not mention anything about oil (R. p. 444).

W. M. Webb produced as a witness by plaintiff, was the first person to respondent after the accident, and sat on the ground and held respondent's head in his lap until the ambulance arrived. Mr. Webb testified there was no oil where he was sitting (R. p. 315); that respondent told him his foot "slipped on the slicky ground," but that he did not mention oil (R. p. 316).

Over the objection of petitioner the court permitted respondent's witness J. C. Stout to testify that about two weeks before respondent was injured, Stout's feet slipped out from under him and caused him to fall on the lead

track about 30 feet from where respondent fell (R. pp. 139, 140), and that he was caused to fall by the presence of "slick mud and oil all mixed together there" (R. p. 140). On cross-examination Stout testified he did not slip in oil but slipped in mud (R. p. 149); that there wasn't any oil where he slipped (R. pp. 149, 150); that he did not remember whether he slipped in November or December before respondent's injury in January (R. p. 147) and that "it could have been" six or eight months before respondent was injured (R. p. 151). Less than a month before Stout testified at the trial, he gave a deposition and testified in answer to questions put to him by respondent's attorney that he slipped down and fell "six or eight months before he (respondent) got hurt" (R. p. 147), and at the same deposition he testified in response to questions by petitioner's attorney that there was no oil there where he slipped (R. p. 149) and that he did not slip on any oil (R. p. 149).

The court overruled petitioner's motion to strike the testimony of Stout with reference to his fall (R. p. 152).

Respondent's witness W. J. Faircloth was permitted to testify over petitioner's objection that he "slipped on a slick spot between the rails and fell" (R. p. 203) in February or March, 1945, after respondent fell, but the court ordered Faircloth's testimony stricken and instructed the jury to disregard it because it was "too remote and far removed" (R. p. 204).

Over petitioner's objection, Troge T. Boothe, a freight train conductor, was permitted to testify that as he was getting on a moving caboose in the railroad yard on November 23, 1944, he "grabbed the grab iron with my right hand and stepped on the step with my left foot, which is the normal procedure for getting on the train, at least when you get on the righthand side of the caboose, and my foot slipped off the step, and when my foot slipped I swung

around and sat down on the step while holding to the grab iron". Asked what caused his foot to slip, he replied "there was water along the lead, and I stepped in this mud, and my shoe was slippery from the oil" (R. p. 310, 311). The court overruled petitioner's motion to strike this testimony of the witness Boothe (R. pp. 310, 311).

Over petitioner's objection, A. H. Staffa, a freight train conductor, was permitted to testify that in the spring of 1944 (which was several months before respondent's injury) his foot slipped from under him and caused him to fall as he was getting off a moving caboose in petitioner's railroad yard. He testified that his train was pulling into the yard and, "as I stepped down on the ground I had my lantern and my bag in my left hand, as I stepped off my feet slipped out from under me and my bag and lantern went in one direction, and I went in the other" (R. p. 313). The court overruled petitioner's motion to strike this testimony of witness Staffa (R. pp. 313, 314).

The record shows that the place where respondent claims his foot slipped was "approximately 2½ cars (lengths) north of the T. & N. O. main line, maybe not quite that far. Q. Main line what? A. T. & N. O. main line switch, north"; that he "must have been 30 or 40 feet from the frog" (R. p. 242). The point where the witness Boothe testified his foot slipped on the step as he was attempting to board a moving caboose a month and a half before respondent fell under a railroad car was "about 30 feet south of the T. & N. O. main line switch" (R. p. 309). And the point where respondent's witness Staffa fell when he jumped off a moving caboose eight months or so before respondent's injury, was "About two and a half car lengths, or about two car lengths," south of the frog, and "approximately 80 feet" from the T. & N. O. switch (R. pp. 312-313).

In arguing the case to the jury, counsel for respondent

said about Stout's testimony that he fell sometime before respondent was injured, "I don't care whether it was three or four weeks, or six or eight months, and I don't care whether counsel impeached the witness, or whether he didn't" (R. p. 568). Counsel further said:

> "I am going to show you gentlemen before we end up here that so far as the switchmen are concerned, it is overwhelming—the overwhelming preponderance of the evidence is in favor of the plaintiff.
>
> "Now, Boothe was the conductor * * *. He testified that on November 23rd, he slipped as he was getting on his caboose, because of oil on his shoes. * * *
>
> "Next, we have Mr. Staffa, another conductor. * * * Now, Staffa said that he was alighting from his caboose one day, or maybe he said in the evening—I don't recall—and he had his lantern, I believe, in one hand, and satchel or suitcase in the other hand, and stepped off the moving caboose, and his feet went out from under him, and he went down on his buttocks. Staffa said he was about 60 feet away from where this accident happened, when he fell. It was the spring of 1944; however, he described the conditions to show that the same conditions had prevailed from that time down to the accident. He described the conditions in December of 1944.
>
> "Counsel asked him one question, and that was all, and he was dismissed.
>
> "Now, going through those witnesses, let me ask you which ones, which witnesses in this case, have the better opportunity to know the facts, and to know whether they had good, sound, and safe footing down there, or whether it was slippery and dangerous?" (R. pp. 569-570.)

The court charged the jury: "The issues in this case are rather sharply drawn. There is a direct conflict between the evidence of the plaintiff and the evidence of the defendant, and it is your function and your responsibility to determine what the facts are. You should, of course,

try the case and determine it upon the evidence which has come to you from this witness stand and the instructions which shall be given to you by the Court" (R. p. 624).

The court further charged the jury

"that if you shall find and believe from the preponderance or greater weight of the evidence in this case that at the time and place mentioned in evidence, which was on the first day of January, 1945, if you shall find and believe from the preponderance or greater weight of the evidence in this case that, at the time and place mentioned in evidence, the defendant carelessly and negligently permitted oil and mud to accumulate in and about the place where this plaintiff was working, and that the joints of its railroad track were low, and that as the trains ran over it the mud and oil, which had carelessly and negligently been permitted to accumulate there, if you shall find that it did, was pumped and churned so that it spread upon the ground and caused the place to be unsafe for this plaintiff and that, as a result thereof, this plaintiff slid and was caused to fall under the train, then it would be your duty to find a verdict for the plaintiff.

"Plaintiff has testified, gentlemen, that while he was in the performance of his duty, and trotting along the side of one of the cars, he stepped in a puddle of oil which he alleges was carelessly and negligently permitted to be and remain upon the track of the defendant. Of course, if you shall find and believe from the preponderance of the evidence there was no oil there, then you cannot find a verdict for the plaintiff.

"If you shall find and believe from the evidence that while in the performance of his duty attempting to raise the pin to separate the cars, the coat which was being worn by the plaintiff blew out and caught some part of the car, thus solely resulting in the plaintiff being thrown beneath the cars, thus injuring him, then your verdict should be for the defendant" (R. pp. 627-628).

On November 1, 1945, the jury returned a verdict finding the issues in favor of respondent (R. p. 11), and assessed his damages at $67,000 (R. p. 11), and on the same day judgment for $67,000 was entered on the verdict (R. p. 12).

Thereafter, and in due time and on November 9, 1945, petitioner filed his motion for a new trial (R. p. 634), which motion was by the court overruled on November 30, 1945 (R. p. 637).

Petitioner appealed to the Circuit Court of Appeals for the Eighth Circuit (Notice filed December 10, 1945, R. p. 1; statement of points on which appellant relied on appeal was filed December 10, 1945, R. pp. 637-640; defendant's designation of contents of transcript on appeal was filed December 10, 1945, R. pp. 640-641; supersedeas bond on appeal was filed December 13, 1945, R. pp. 641-642; certificate of the clerk as to the correctness and completeness of the transcript of the record and proceedings was filed January 18, 1946, R. p. 643).

The case was briefed and submitted to the Circuit Court of Appeals for the Eighth Circuit, and was argued orally before that court on May 10, 1946.

At the trial of the case in the District Court petitioner complained to the District Court, and in his brief and oral argument complained to the Circuit Court of Appeals that the trial court erred in permitting plaintiff's witnesses Stout, Faircloth, Boothe and Staffa to testify that they slipped and fell at various times and at various places in petitioner's railroad yard before respondent fell and was injured in that yard.

Petitioner, in his original brief filed in the Circuit Court of Appeals, and at pages 28 and 29 thereof, presented to the Circuit Court of Appeals for its determination the following propositions of law in the following language:

"I. The Court erred in admitting incompetent, irrelevant, and immaterial testimony on behalf of plaintiff, which testimony was calculated to confuse and mislead the jury and to prejudice the jury against defendant.

"(c) It was error to permit Stout to testify that he slipped on mud and oil in defendant's railroad yard about two or three weeks before plaintiff was injured (Tr. 136, 139-140).

"(d) It was error to permit Faircloth to testify that he stepped on a slick spot of water and oil on defendant's track and was thereby caused to slip and fall (Tr. 202, 203).

"(e) It was error to permit Boothe to testify that his foot slipped off the step of a moving caboose several weeks before plaintiff was injured (Tr. 309-311).

"(f) It was error to permit Staffa to testify that he fell as he was getting off a moving caboose in the spring of 1944 (Tr. 313-314)."

Petitioner herein, appellant in the Circuit Court of Appeals, cited cases and authorities for each of the above propositions of law and argued said propositions to the Circuit Court of Appeals.

On May 10, 1946, the Circuit Court of Appeals heard the arguments of counsel and took the case as submitted on the transcript of the record from the District Court and the briefs filed in the Circuit Court of Appeals (R. p. 645).

On July 12, 1946, the Circuit Court of Appeals filed its opinion (R. pp. 646-655), in which it held:

"Defendant contends that the District Court erred in admitting evidence of four witnesses that they slipped and fell in the same railroad yard and near the point at which plaintiff's accident occurred. Over defendant's objection plaintiff's witness J. C. Stout, a switchman, testified that two or three weeks before the accident involved he slipped and fell as a result of

slick mud and oil at a point near the scene of plaintiff's accident, and another switchman, W. J. Faircloth, testified that in February or March following plaintiff's accident he slipped and fell on oil and water at a point a short distance from the point at which plaintiff was injured. Defendant contends that the testimony of these switchmen was incompetent and that insufficient foundation was laid, in that the conditions were not shown to be the same at the time they fell as they were at the time of plaintiff's accident" (R. pp. 653-654 Original, p. 652 other copies).

"We deem the circumstances surrounding the accidents sustained by these switchmen sufficiently similar to that sustained by plaintiff to render the testimony admissible. They attributed their falls to the same conditions encountered by plaintiff and their falls occurred in the same general location, though not at the exact spot of plaintiff's injury. But the differences in detail could be brought out on cross-examination and did not require exclusion of the evidence" (R. p. 654 Original, p. 653 other copies).

"Conductor T. T. Boothe testified that on November 23, 1944, and by reason of oil along the lead his foot slipped off the step of a moving caboose at a point near the point of plaintiff's accident, and another conductor, A. H. Staffa, testified that in the spring of 1944 he slipped and fell near the scene of plaintiff's accident while he was attempting to alight from a moving caboose, that the footing was slippery as a result of water, oil and muck coming down off the top of the lead, and that the mud and muck and 'whatever was washed down on these tracks' caused him to fall. The conductors did not fall in the same manner plaintiff did, but they did fall in the same general area, and the plain import of their testimony was that they, too, fell because of the oily and slippery condition of the roadbed" (R. p. 655 Original, p. 653 other copies).

"While it might have been better to have excluded testimony of the conductors, especially that of Staffa, which related to an accident remote in time from plaintiff's accident, we hold its admission was not an

abuse of discretion. Nor does the record disclose prejudice as a result of the District Court's ruling. It is true there was a conflict in the evidence regarding the condition of the walkway along the lead. But a witness for defendant testified that the grouund was oily at the time of the accident, and that he had noticed oil there on that morning. Testimony of this and of other witnesses (some called by defendant) was sufficient in itself to justify a finding that there was oil around the lead, that the ground was slippery on the day of the accident, and that this condition had existed for some time. Hence, the material fact to which this evidence related was sufficiently established, not only by plaintiff's other witnesses, but by testimony of some of defendant's own witnesses. We are reluctant to reverse a judgment for admission of incompetent evidence of a material fact otherwise proven. Mo. K. T. Ry. Co. v. Elliott, 8 Cir., 102 F. 96; St. Louis & San Francisco R. Co. v. Duke, 8 Cir., 192 F. 306. Furthermore, the testimony of Boothe and Staffa related to rather minor and insignificant incidents which, under the circumstances, could have had little if any influence on the jury. Whether prejudice results from erroneous admission of evidence is not to be determined abstractly, but depends upon practical effect viewed in the light of the trial as a whole. United States v. Becktold Co., 8 Cir., 129 F. 2d 473" (R. pp. 655, 656 Original, pp. 654, 655 other copies).

"The appellant in its brief presents argument relating to inconsistencies in the testimony of plaintiff's witnesses and to weight of evidence and credibility of witnesses. But the jury has passed on these questions and we are bound by its decisions. Tennant, Admx., v. Peoria & Pekin Union Ry. Co., 321 U. S. 29" (R. p. 656 Original, p. 655 other copies).

"Other portions of appellant's brief deal with the use to which testimony, especially that admitted over defendant's objection, was put by plaintiff's counsel in his oral argument to the jury, and are directed principally to the issue of prejudice which appellant contends resulted from admission of incompetent testi-

mony. So far as plaintiff's oral argument was directed to testimony of the two conductors it consisted merely of a brief review of that testimony and no special emphasis was placed thereon. If, as suggested by appellant, unjustified inferences were drawn from the evidence in plaintiff's oral argument, the remedy was to point that out to the jury and to object to argument considered by respondent to be improper, preserving any adverse ruling for review" (R. pp. 656-657 Original, p. 655 other copies).

"The verdict and judgment are sustained by the evidence and we find no reversible error in the District Court's rulings on admission of testimony. The judgment must be and is affirmed" (R. p. 657 Original, p. 655 other copies).

Petitioner argued, both in the District Court and in the Circuit Court of Appeals, both in his brief and at the oral argument, that the testimony of respondent's witness Stout was so self-contradictory that it is unworthy of belief, and that a sufficient foundation was not laid for Stout to testify about his alleged fall, because there was no showing that the conditions prevailing at the time were in anywise similar to the conditions prevailing at the time of respondent's injury; and that Stout's testimony on cross-examination so completely destroyed and nullified the effect of his testimony on direct examination that it should be stricken from the record and the jury instructed to disregard it.

Petitioner also argued in the District Court and in the Circuit Court of Appeals, and both in his briefs and in oral argument, that the testimony of respondent's witness Boothe that on November 23, 1944, his foot slipped off the step of a moving caboose as he was attempting to get on it, and that he swung around and sat down on the step, because there was oil on his shoe, did not present a set of circumstances similar to the circumstances under which

respondent claims he was injured; that the incident occurred 150 feet away from where respondent fell, and about six weeks before he was injured.

Petitioner also argued both in the District Court and in the Circuit Court of Appeals, and both in his briefs and at the oral arguments, that the District Court erroneously admitted the testimony of respondent's witness Staffa that he fell off a moving caboose, because there was no similarity between the circumstances under which Staffa fell and the circumstances under which respondent fell; and because the time of Staffa's fall in the spring of 1944 was too remote from the time of respondent's injury on January 1, 1945. Petitioner also pointed out that the record is silent as to what kind of day it was when Staffa fell, and does not show whether it was hot or cold, or whether the weather was rainy or dry.

Petitioner argued in the Court of Appeals, both in his brief and at the oral argument, that respondent's counsel relied on the incompetent testimony of Stout, Boothe and Staffa.

And petitioner argued both in the District Court and in the Circuit Court of Appeals, and both in his briefs and at the oral arguments, that the jury was influenced by the incompetent testimony of respondent's witnesses Stout, Faircloth, Boothe and Staffa; that petitioner did not have a fair trial; that the verdict of the jury was influenced by incompetent testimony of these witnesses and by the argument of respondent's counsel concerning their testimony.

In his brief in the Court of Appeals petitioner cited cases and decisions of the Supreme Court of the United States, and of several of the Circuit Courts of Appeal, as well as decisions of State Courts, and text-book authorities, all agreeing with petitioner's contention that in the absence of evidence that a previous accident had happened at the same place and under similar circumstances to the accident complained of, evidence of the previous accident is inad-

missible; and that, in the absence of a showing that the essential conditions were the same, an issue as to the existence of a particular temporary condition cannot be proved by evidence as to the existence of other similar conditions at another time.

Petitioner submits that with reference to the propositions of law here mentioned, to-wit: (a) The District Court erred in refusing to strike the testimony of a witness for respondent that he slipped on oil and fell two or three weeks before respondent's injury, after the witness admitted on cross-examination that he did not slip on oil and that the date of his fall might have been six or eight months before respondent was injured. And the Circuit Court of Appeals erred in ruling that the testimony of such witness was admissible and was sufficient to show that he fell two or three weeks before respondent fell, and under similar circumstances and conditions (Original Record p. 654, p. 653 of other copies). (b) The District Court erred in permitting respondent to introduce evidence that four of respondent's witnesses had slipped and fallen in the same railroad yard where respondent claims he slipped and fell, when there was no evidence that any of the four witnesses had slipped or fallen at the same place where respondent fell, or that any of them had fallen under similar circumstances, and when there was no evidence that either of the four witnesses were caused to slip or fall by the same condition which allegedly caused respondent to slip and fall, and the Circuit Court of Appeals erred in holding with reference to two of those witnesses that "the circumstances surrounding the accidents sustained by these switchmen (were) sufficiently similar to that sustained by plaintiff to render the testimony admissible" (Original R. p. 654, p. 653 other copies), and in holding that, although the testimony of the two conductors who slipped and fell in petitioner's railroad yard was incompetent, and should

have been excluded, its admission did not constitute prejudicial error (R. pp. 655-656 Original, pp. 654-655 other copies).

Wherefore, petitioner presents to this Honorable Court the following questions:

QUESTIONS PRESENTED.

I.

Where a witness testified at the trial of a case arising under the Federal Employers' Liability Act, that two or three weeks before the accident involved he slipped and fell as a result of slick mud and oil at a point near the place where the plaintiff claims he slipped and fell as result of the presence of oil, and where the same witness testified by deposition a month before the trial and on cross-examination at the trial, that he fell about eight months before plaintiff did, that he did not slip in oil, and that there wasn't any oil where he slipped, and where he admitted at the trial that he had so testified by deposition, and admitted that the date of his fall could have been eight months before plaintiff was injured, and where there was no explanation of the contradictory statements of the witness, does the testimony of such witness have any legal tendency to establish the truth of either of his statements, and does it furnish a sufficient basis for the Circuit Court of Appeals to find that the witness slipped and fell two or three weeks before plaintiff fell, and that the circumstances surrounding his fall were sufficiently similar to that sustained by plaintiff to render the testimony admissible, and to find that such witness was caused to fall by the same conditions encountered by plaintiff?

II.

In a suit arising under the Federal Employers' Liability Act, where the employee claims he was caused to slip and fall and be injured by reason of the employer's negligence

in permitting an accumulation of oil and water alongside the railroad track where the employee was required to work, is it reversible error to admit evidence that other persons had slipped and fallen at other places in the same railroad yard, not at or about the same time that the injured employee slipped and fell, and when there is no showing that the circumstances surrounding the accidents sustained by such other persons were the same as the circumstances surrounding the accident to the injured employee, and when there was no showing that the conditions to which the injured employee attributed his fall were the same conditions which caused such other persons to slip and fall?

III.

In a suit brought under the Federal Employers' Liability Act for damages for injuries sustained by an employee who claims he slipped and fell and was injured because of the negligence of his employer in permitting an accumulation of oil and water alongside the track where the employee was required to work, and where the opinion of the Circuit Court of Appeals shows that the District Court admitted testimony of witnesses who slipped and fell in the same railroad yard, but "did not fall in the same manner plaintiff did", nor at the same place or at or near the same time, and where the opinion of the Court of Appeals finds that the "plain import" of the testimony of such other witnesses "was that they too fell because of the oily and slippery condition of the roadbed," is it error for the Court of Appeals to hold that the employer was not prejudiced by the admission of such testimony because it "related to rather minor and insignificant incidents which, under the circumstances, could have little if any influence on the jury"?

REASONS FOR GRANTING THE WRIT.

I.

One of respondent's witnesses was permitted to testify on direct examination and over petitioner's objection that two or three weeks before the accident involved he slipped and fell as a result of slick mud and oil at a point near the scene of respondent's accident (R. pp. 139-140). On cross-examination this same witness admitted there was no oil where he slipped (R. p. 149); that he did not slip in oil (R. pp. 149-150); that he did not recall the date when he slipped, and that it could have been six or eight months before respondent's accident (R. p. 151).

The District Court admitted the testimony of this witness over petitioner's objection (R. p. 137), and overruled petitioner's motion to strike the testimony after the witness had testified as stated on cross-examination (R. p. 152). The decision of the Court of Appeals that the testimony of the witness was competent to show "that two or three weeks before the accident involved he slipped and fell as a result of slick mud and oil at a point near the scene of plaintiff's accident" (R. pp. 653-654 Original, p. 652 other copies), and that "the circumstances surrounding the accidents sustained by" this witness and another were "sufficiently similar to that sustained by plaintiff to render the testimony admissible" (R. p. 654 Original, p. 653 other copies) is erroneous and is in direct conflict with the decisions of the Supreme Court in:

Southern Railway Co. v. Gray, 241 U. S. 333, 339, 60 L. Ed. 1030, 1033;

Russell v. Southard et al., 53 U. S. 139, 13 L. Ed. 927, 931, 12 Howard 139, 149.

(a) Said decision of the Circuit Court of Appeals is in direct conflict with the following prior decisions of the same Circuit Court of Appeals:

Ellis v. United States (C. C. A. 8), 138 Fed. 2 612;
United States v. Kiles (C. C. A. 8), 70 Fed. 2 880, 883.

(b) Said decision of the Circuit Court of Appeals is in direct conflict with the following decisions of other Circuit Courts of Appeal:

Rashau v. Central Vermont Railway, Inc., et al. (C. C. A. 2), 133 Fed. 2 253, 256;
In re Gustav Schaefer Co. (C. C. A. 6), 103 Fed. 2 237 242, c. d. 308 U. S. 79, 84 L. Ed. 485.

II.

Respondent testified that he stepped in some oil on the ground as he was performing a switching operation in petitioner's railroad yard, and that he was thereby caused to slip and fall under the wheels of a moving railroad car (R. p. 241). Over petitioner's objection one freight train conductor was permitted to testify that five or six weeks before respondent fell his foot slipped off the step of a moving caboose as he was attempting to board it because he had stepped in some mud and his shoe was slippery from oil (R. pp. 309-310). Also, over petitioner's objection, another conductor was permitted to testify that several months before respondent's accident he slipped and fell when he stepped in some "mud and muck and whatever was washed down on these tracks" as he stepped off a moving train with a lantern and bag in his left hand (R. p. 313). The Court of Appeals found that "the plain import of" the testimony of the two conductors "was that they, too, fell because of the oily and slippery condition of the roadbed" (R. p. 655 Original, p. 653 other copies), and held that "it might have been better to have

excluded testimony of the conductors," of the "material fact to which this evidence related" (R. pp. 655-656 Original, p. 654 other copies), but held that the admission of the testimony was not an abuse of discretion; that it "related to rather minor and insignificant incidents which, under the circumstances, could have had little if any influence on the jury" (R. p. 656 Original, p. 655 other copies). The decision of the Court of Appeals that the admission of the testimony of the two conductors was not prejudicial and did not constitute reversible error is erroneous, and is in direct conflict with the decision of the Supreme Court in

The Columbia and Puget Sound Railway Co. v. Hawthorne, 144 U. S. 202, 208, 36 L. Ed. 405, 407;

Lucas v. Brooks, 85 U. S. 436, 21 L. Ed. 779, 783.

(a) The said decision of the Circuit Court of Appeals is in direct conflict with the following prior decision of that court:

Union Electric Light & Power Co. v. Snyder Estate Co. (C. C. A. 8), 65 F. 2 297, 310 [27];

Lever Bros. Co. v. Atlas Assur. Co. (C. C. A. 8), 131 F. 2 770, 777.

(b) The decision of the Circuit Court of Appeals is in conflict with the following decisions of other Circuit Courts of Appeals:

Beck v. Wings Field, Inc. (C. C. A. 3), 122 F. 2 114.

(c) The said decision of the Circuit Court of Appeals is in direct conflict with the general law as declared by State Courts in the following cases:

Robitaille v. Netoco Community Theatres (Mass.), 25 N. E. 2 749;

Eisenstrager v. Great Northern Ry. Co. (Iowa), 160 N. W. 311;

Langhammer v. City of Manchester (Iowa), 68 N. W. 688;
Fox Tucson Theatres Corp. v. Lindsay (Ariz.), 56 P. 2 183;
Neil v. Bank of America (Calif.), 104 P. 2 107;
Cunningham v. City of Springfield (Mo.), 131 S. W. 2 123;
Louisville & N. R. Co. v. Loesch (Ky.), 284 S. W. 1097;
Hipsley v. The Kansas City, St. J. & C. B. Ry. Co., 88 Mo. 348;
Bowles v. Kansas City, 51 Mo. A. 416.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued by this Honorable Court and that the judgment of the Eighth Circuit Court of Appeals be reversed.

WAYNE ELY,
Tenth Floor Commerce Bldg.,
St. Louis, Missouri,
Solicitor for Petitioner.

A. H. KISKADDON,
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St. Louis, Missouri,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the Court of Appeals appears at pages 647 to 657 of the original record filed herewith, and at pages 646 to 655 of the other copies filed herewith. The order and judgment affirming the judgment of the District Court is at page 658 of the original record, and at page 656 of the other copies filed herewith. The certificate of the clerk of the Circuit Court of Appeals is at page 659 of the original record filed herewith, and at pages 656 and 657 of the other copies filed.

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, now being Section 347 (a), Title 28, U. S. Code.

2. The date of the judgment of the trial court is November 1, 1945 (R. p. 1112). Motion for a new trial was overruled November 31, 1945 (R. p. 647). An appeal was duly perfected and there was a judgment in the Circuit Court of Appeals on July 12, 1946 (R. p. 656).

III.

STATEMENT OF THE CASE.

In the petition, at pages 1 to 17, a full statement of the case, so far as the law and the facts are material to a consideration of the questions here presented.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that the testimony of one of respondent's witnesses was competent to prove that he slipped on mud and oil two or three weeks before respondent's accident (R. pp. 653-654 Original, p. 652 other copies), and that the witness' fall was under circumstances attributable to the same conditions that caused respondent to fall, notwithstanding the fact that the witness testified on cross-examination that there was no oil where he slipped (R. p. 149); that he did not slip in oil (R. pp. 149-150); and that the date of his fall could have been six or eight weeks before respondent's accident (R. p. 151).

2. In holding that the District Court did not err in admitting evidence that two conductors lost their footing and fell—one when his foot slipped off the step of a moving caboose as he was attempting to board it six weeks before respondent's accident; and another who testified he was caused to fall by "mud and muck and 'whatever was washed down on these tracks' " as he attempted to alight from a moving caboose several months before respondent's accident.

3. In holding that petitioner was not prejudiced by the admission of incompetent evidence of two conductors who were permitted to testify to falls experienced by them, notwithstanding the opinion shows "the conductors did not fall in the same manner plaintiff did" (R. p. 655 Original, p. 653 other copies), and that the testimony of one of them "related to an accident remote in time from plaintiff's accident" (R. pp. 655-656 Original, p. 654 other copies), and notwithstanding the Court of Appeals found that "the plain import of their testimony was that they too fell be-

cause of the oily and slippery condition of the roadbed" (R. p. 655 Original, p. 653 other copies).

"As the incompetent evidence admitted against the defendant's exception bore upon one of the principal issues on trial, and tended to prejudice the jury against the defendant, and it cannot be known how much the jury were influenced by it, its admission requires that the judgment be reversed * * *."

The Columbia & Puget Sound Railway Co. v. Hawthorne, 144 U. S. 202, 208, 36 L. Ed. 405, 407.

V.

SUMMARY OF ARGUMENT.

A.

SPECIFICATIONS OF ERROR.

It conclusively appears from the record that respondent claims that as he was running alongside a railroad car, and was shaking and pulling on a pin lift lever in an effort to uncouple two cars, he stepped over a rail with his left foot "and slipped on that oil and slush and stuff" and fell under the cut of cars (R. p. 241). It further appears from respondent's testimony that he claims his foot slipped when he was about two and one-half car lengths north of a main line switch, and around thirty feet south of a frog (R. p. 253), which frog was 129 feet north of the switch (R. pp. 30-31).

Respondent testified that the oil on which he stepped was part of a puddle about ten or twelve feet long and three or four inches wide (R. pp. 266, 267).

Over petitioner's objection one of respondent's witnesses, J. C. Stout, was permitted to testify that while he was pulling pins his feet slipped out from under him and he fell (R. p. 139), about two or three weeks before respondent's accident (R. p. 140), and that he was caused to fall

because of "that slick mud and oil mixed together there" (R. p. 140). A month before his testimony at the trial Stout testified by deposition that his fall was six or eight months before respondent got hurt (R. p. 147); that he slipped in mud; that there was no oil where he slipped, and that he did not slip on oil (R. pp. 149-150). On cross-examination at the trial Stout testified he fell about three car lengths north of the main line switch (R. p. 142); that he did not slip in oil (R. p. 149); that he did not recall when he slipped, and that it could have been six or eight months before respondent's accident (R. p. 151). There was no explanation of the contradictions in Stout's testimony.

After the witness Stout had testified as here stated, petitioner moved to strike his testimony with reference to his fall, and the District Court overruled the motion (R. p. 152). The Circuit Court of Appeals ruled that the testimony of Stout was properly admitted, and that his fall was attributable to the same conditions encountered by respondent (R. p. 654 Original, p. 653 other copies).

The opinion of the Court of Appeals makes no mention of the contradictory statements of Stout and in holding that his testimony was admissible and that the circumstances surrounding his fall were similar to the circumstances surrounding respondent's fall, and that Stout's fall was attributed to the same conditions encountered by respondent, and in the same general location, the opinion of the Court of Appeals upsets its own prior decisions, runs contrary to decisions of other Courts of Appeals and is in direct conflict with the decisions of the Supreme Court.

> "Of course, the contradictory statements can have no legal tendency to establish the truth of their subject-matter."
>
> Southern Railway Co. v. Gray, 241 U. S. 333, 339, 60 L. Ed. 1030, 1033.

"It cannot be said that this testimony given on cross-examination went only to the credibility of the witness or the weight to be given to his testimony. The testimony there given corrects, retracts, and entirely nullifies the testimony given on direct examination."

United States v. Kiles (C. C. A. 8), 70 Fed. (2) 880, 883 [5].

See also:

Ellis v. United States (C. C. A. 8), 138 F. (2) 612;
In re Gustav Schaefer Co. (C. C. A. 6), 103 F. (2) 237, 242;
Rashaw v. Central Vermont Ry., Inc. (C. C. A. 2), 133 F. (2) 253, 256.

B.

As stated, respondent claims that he slipped in a puddle of oil about two and one-half car lengths (or 100 feet) north of the main line switch. One of respondent's witnesses, conductor T. T. Boothe, was permitted to testify over petitioner's objection that his foot slipped off a moving caboose about thirty feet south of the main line switch (R. p. 309) (or 130 feet from where respondent was injured) approximately six weeks before respondent's accident, and that his foot slipped because there was water on the lead and his shoe was slippery from oil (R. p. 310).

Another of respondent's witnesses, conductor A. H. Staffa, was permitted to testify that in the spring of 1944, as he stepped from a moving train onto the ground, about eighty feet south of the frog which was north of the main line switch (R. pp. 312-313), about fifty feet from the place where respondent fell, he was caused to slip and fall by "the mud and muck and whatever was washed down on these tracks" (R. p. 313). As conductor Staffa stepped from the train to the ground he was carrying a lantern and a bag in one hand, and his feet slipped out from under him (R. p. 313).

The opinion of the Court of Appeals declares that "the plain import" of the testimony of the two conductors "was that they too fell because of the oily and slippery condition of the roadbed" (R. p. 655 Original, p. 653 other copies), and found that "it might have been better to have excluded the testimony of the conductors, especially that of Staffa which related to an accident remote in time to plaintiff's accident," and pointed out that "there was a conflict in the evidence regarding the condition of the walkway along the lead" (R. p. 656 Original, p. 654 other copies), but held that the admission of the testimony of the conductors was not an abuse of discretion because the material fact to which that evidence related was sufficiently established by other witnesses, and because their testimony "related to rather minor and insignificant incidents, which, under the circumstances, could have little if any influence on the jury" (R. p. 656 Original, p. 655 other copies).

In holding that the admission of the testimony of the two conductors was not prejudicial to petitioner and did not constitute reversible error, the opinion of the Circuit Court of Appeals is contrary to former decisions of that Court, contrary to the decisions of other Circuit Courts of Appeals and of State Courts of last resort, and is in direct conflict with the decisions of the Supreme Court.

> "As the incompetent evidence admitted against defendant's objection bore upon one of the principal issues of the trial, and tended to prejudice the jury against the defendant, and it cannot be known how much the jury were influenced by it, its admission requires that the judgment be reversed, and the case remanded to the Supreme Court of the State of Washington, with directions to set aside the verdict and to order a new trial."
>
> The Columbia & Puget Sound Railway Co. v. Hawthorne, 144 U. S. 202, 208, 36 L. Ed. 405, 407.

"A judge well performs his duty when he guards the jury against having their attention diverted from the real issue by the introduction of immaterial evidence."

Lucas v. Brooks, 85 U. S. 436, 21 L. Ed. 779, 783.

ARGUMENT.

The opinion of the Court of Appeals correctly states that the District Court submitted the case to the jury "solely on the question whether plaintiff slipped on oil and mud which defendant negligently permitted to accumulate at the place of the accident; or whether, as contended by defendant, plaintiff's coat caught on some part of the railroad car, causing plaintiff to be thrown under it" (R. p. 648 Original, p. 647 other copies).

The opinion also correctly states that the only question presented for review on appeal was the admission of evidence over defendant's objection (R. p. 648 Original, p. 647 other copies).

The facts are not complicated. Respondent, plaintiff in the District Court, alleged in his complaint that petitioner negligently failed to provide him with a reasonably safe place in which to work in that petitioner permitted an accumulation of oil and water along the lead track where respondent was required to work as a switchman, and to operate a pin-lift lever in order to uncouple certain cars (R. p. 4).

Respondent went on duty at 8 o'clock a. m., January 1, 1945, and was injured at about 8:40 o'clock that morning (R. p. 236). Respondent testified he was standing on the ground when he got a signal to cut off two cars from the rear end of a train of fifteen or eighteen cars; that the foreman gave a "kick signal," and just as the cars started in motion he operated a pin-lift lever which pulled a coupling pin out of the coupling between two cabooses (R. p. 238); that he then stepped away from the cars and after they had moved a few feet he "heard the pin fall and I took out after the cars and run them down and was to pull the pin again" (R. p. 239); that he caught up with the car and was running alongside "shaking and pulling"

on the pin-lift lever in an effort to "get the pin to come up and stay up," and while running alongside the cars in this manner he stepped over a rail with one foot "and when I did I slipped on that oil and slush and stuff and fell under the cut of cars" (R. p. 241). Respondent testified that the oil in which he stepped was part of a "puddle" about ten or twelve feet long and three or four inches wide (R. pp. 266, 267).

Forty-nine witnesses testified in the case. Thirty-one of them were employed in petitioner's railroad yard where the accident happened; some as switchmen, engineers, firemen, office and shop employees, and one "track walker," included in whose duties was the job of cleaning up on the "lead." This track walker was on duty when respondent was hurt (R. p. 394) and cleaned up immediately after the accident (R. p. 395). He testified there was no oil where the accident occurred, and no other witness, except respondent, testified to the presence of oil at the place where respondent fell under the cars.

In support of petitioner's contention that respondent was not injured as result of stepping in oil, but that his coat caught on one of the cars as he was operating a pin-lift lever, and jerked him under the car, petitioner produced four witnesses. Bill Cole, a switchman and member of respondent's crew at the time of the accident, testified he saw respondent make the cut between the cars and start to step away and that as he stepped back his coat flew out against the car and respondent fell (R. p. 375). Dr. Carleton L. Harris, house physician at the hospital where respondent was taken after the accident (R. p. 328), testified that respondent told him in the emergency room at the hospital that he had on too much clothing and his clothing caught on the train and caused him to slip under the train (R. pp. 329, 331). Dr. Arthur E. Herold, president and general manager of the hospital, testified that

respondent told him in the emergency room of the hospital that his "coat caught in some way on one of the cars and jerked me under" (R. p. 444).

Clifford Walker, orderly at the hospital, testified respondent told him both in the operating room and later in room 207 at the hospital "if it hadn't been for the amount of clothing he had, he might have prevented the accident" (R. p. 335), that he made the statement "if it hadn't been for this amount of clothing he had on this trouble wouldn't have happened" (R. p. 340).

Respondent testified that at the time of the accident he had on two pairs of pants, a sweat shirt and two work shirts, and a little chamois skin jacket, one of those zip-up jackets, and a brown hunting coat—canvas coat (R. p. 281).

W. M. Webb, produced as a witness by respondent, testified that he was the first man to respondent after the accident, and that he sat on the ground and held respondent's head in his lap while waiting for the ambulance to come. Webb testified there was no oil where he was sitting (R. p. 315). The testimony of ten witnesses who said there was no oil along the lead track where the accident occurred, or not a sufficient amount of oil to create a slippery condition, may be found in the record at pages 353-356, 363, 384, 396, 401, 408, 413, 422, 433, 437, and 528-529.

Eight witnesses testified to the presence of excessive oil along the lead track, but did not say there was oil at the place where respondent fell. The testimony of those eight witnesses may be found in the record at pages 38, 85-87, 134, 184, 186, 190, 195-197, 369, 370, 426-427 and 439.

One witness, J. J. Rains, testified he saw "something that looked like oil" at the place where respondent was lying after the accident (R. p. 454), but testified he did not know whether it was oil he saw; that "it was smut is what it was" (R. p. 456). "I didn't say it was oil; it was some-

thing black mixed with mud. It could have been cinders, but it looked oily" (R. p. 460).

It is worthy of comment here that respondent testified that after he slipped in oil at a point two and one-half car lengths north of the main line switch (R. p. 253), he was pulled or pushed along the rail until he ended up at a point about 15 or 20 feet north of that switch (R. p. 244), to the point where Rains saw him lying.

Over petitioner's objection four witnesses were permitted to testify on behalf of respondent that they had slipped and fallen at various points along the lead track and at various times. The testimony of one of those witnesses, Faircloth, was stricken, and the jury was instructed to disregard his testimony after it appeared he did not fall until six weeks or two months after respondent fell. Inasmuch as the testimony of that witness was ordered stricken, petitioner does not here complain of its admission.

However, petitioner insists that the District Court committed reversible error in admitting the testimony of the three other witnesses concerning their accidents, and in refusing to strike their testimony, and that the Court of Appeals erroneously held that the admission of the testimony of those three witnesses did not constitute reversible error.

The first witness whose testimony is complained of was J. C. Stout. On direct examination this witness was permitted to testify over objection of petitioner that two or three weeks before respondent was injured he slipped on oil and mud and fell at a point about twenty or thirty feet from the point where respondent claims he slipped on oil. There was no testimony, and there is no claim, that the witness Stout slipped on the same oil that respondent claims he slipped on. Neither is there any evidence that the circumstances under which Stout claims he slipped and fell were similar to the circumstances under which respond-

ent fell. Stout says he was "pulling pins up there, I believe it was, and happened to step kind of between the main line and the main switch" (R. p. 139), but it does not appear that he was running alongside any moving cars, or that he was actually operating a pin lift lever when he fell. Furthermore, Stout's testimony on cross-examination was so contradictory and so confusing that it is impossible to determine whether he was telling the truth when he said on direct examination that he slipped two or three weeks before the accident involved in this case, or when he said he slipped and fell six or eight months before respondent was hurt. Neither is it possible to tell from Stout's own testimony whether he slipped in oil, or did not slip in oil, or whether there was any oil present at the time of his alleged accident, or what, if anything, caused him to fall.

The contradictions and discrepancies in Stout's testimony are apparent in the record, and were pointed out to the Court of Appeals, both in petitioner's brief filed with that court and in oral argument before that court. But the opinion makes no reference to Stout's contradictory statements. The opinion refers only to his testimony "that two or three weeks before the accident involved he slipped and fell as a result of slick mud and oil at a point near the scene of plaintiff's accident" (R. pp. 653-654 Original, p. 652 other copies), and holds that the circumstances surrounding Stout's alleged accident were sufficiently similar to the circumstances prevailing at the time of respondent's accident to render his testimony admissible, and that his fall was caused by the same conditions encountered by respondent (R. p. 654 Original, p. 653 other copies).

Also, over petitioner's objection the District Court admitted the testimony of respondent's witness Troge T. Boothe that on November 23, 1944 (which was several weeks before respondent was injured), as he was attempting to get on a caboose which was moving about eight or

ten miles an hour he "grabbed the grab iron with my right hand and stepped on the step with my left foot * * * and my foot slipped off the step, and when my foot slipped, I swung around and sat down on the step while holding to the grab iron" because "there was water along the lead, and I stepped in this mud, and my shoe was slippery from the oil" (R. p. 310). There is no testimony as to where the oil on Boothe's shoe came from.

By way of explanation as to why that testimony was offered, respondent's counsel said to the witness: "We are interested with respect to the footing, and what have you to say as to that?" (R. p. 309).

The place where Boothe slipped off the step was about thirty feet South of the main line switch (R. p. 309), or about one hundred and thirty feet South of the point where respondent claims his foot slipped (R. p. 253). The testimony of this witness was admitted over petitioner's objections that it was immaterial; that it would not prove or disprove anything in this case; that it was not in the same place where this accident happened, but was in the opposite direction; that it couldn't be attributed to the same condition to which respondent attributed his accident (R. p. 309); that it didn't happen where respondent's accident happened, but in a different part of the yard (R. p. 310). The objections were overruled, and after the witness described the manner in which his foot slipped, petitioner moved to strike the answer "because the answer shows it did not happen under circumstances even similar to the circumstances here" (R. p. 310). The motion to strike was overruled (R. p. 310).

Another freight train conductor, A. H. Staffa, produced as a witness by plaintiff, was permitted to testify over petitioner's objection that in the Spring of 1944 (R. p. 312), which was several months before respondent's accident on January 1, 1945, he slipped and fell about eighty feet South of the frog (R. p. 313), which was fifty feet

further from the frog than the place where respondent testified he slipped (R. p. 253). It was petitioner's contention in the District Court, in the Court of Appeals, and is petitioner's contention here, that the circumstances under which the witness Staffa fell were in no wise similar to the circumstances obtaining at the time of respondent's accident. Staffa did not say he slipped because of the presence of oil, but testified he was caused to slip and fall by "the mud and muck and whatever was washed down on these tracks * * * as I stepped down on the ground" from a moving train. "I had my lantern and my bag in my left hand, as I stepped off my feet slipped out from under me and my bag and lantern went in one direction, and I went in the other" (R. p. 313). Petitioner's motion to strike the testimony of Staffa because it did not tend to prove or disprove anything in this case and because the "circumstance under which this witness fell was not in anywise similar, the time of year was different, the spring of 1944, and it was too remote" (R. pp. 313, 314) was denied.

In holding that the admission of the testimony of conductors Boothe and Staffa did not constitute reversible error, the Court of Appeals held that "the material fact" to which their evidence related was sufficiently established by other witnesses, and said "we are reluctant to reverse a judgment for admission of incompetent evidence of a material fact otherwise proven" (R. p. 656 Original, p. 654 other copies). The Court of Appeals also said that the testimony of the conductors "related to rather minor and insignificant incidents, which, under the circumstances, could have had little if any influence on the jury" (R. p. 656 Original, p. 655 other copies).

The opinion of the Court of Appeals admits that "The conductors did not fall in the same manner plaintiff did" but finds that "they did fall in the same general area,"

and declares that "the plain import of their testimony was that they too fell because of the oily and slippery condition of the roadbed" (R. p. 655 Original, p. 653 other copies).

The finding of the Court of Appeals that "the plain import" of the testimony of the conductors "was that they too fell because of the oily and slippery condition of the roadbed" which allegedly caused respondent's accident, is irreconcilable with the finding that their testimony "could have had little if any influence on the jury." It is illogical to say that the testimony of the conductors would so forcibly impress the Court of Appeals, but that it would not impress the jury.

Furthermore, in disposing of petitioner's contention that respondent's counsel relied upon the incompetent testimony of Boothe and Staffa to persuade the jury that the roadbed was slippery at the time of respondent's accident, the opinion of the Court of Appeals erroneously finds that "So far as plaintiff's oral argument was directed to testimony of the two conductors it consisted merely of a brief review of that testimony and no special emphasis was placed thereon" (R. p. 657 Original, p. 655 other copies).

The record shows that the Court of Appeals is mistaken. Respondent's counsel not only placed "special emphasis" on the testimony of both Boothe and Staffa in his argument to the jury, but he referred to their testimony as constituting "the overwhelming preponderance of the evidence in favor of the plaintiff" (R. p. 569); and after reviewing Boothe's testimony, he pointed out to the jury that petitioner's counsel "didn't ask him one single, solitary question, not one." And said, "That testimony is uncontradicted, undisputed, undenied, in this lawsuit" (R. p. 569).

After reviewing Boothe's testimony, respondent's counsel turned immediately to the testimony of Staffa, and said that his testimony showed "that the same conditions

had prevailed" from the time of his fall in the spring of 1944 "down to the accident. He described the conditions in December of 1944" (R. p. 570). Reference to the record discloses that when Staffa was asked to tell what he noticed with reference to the footing, his entire answer was "Slippery and muddy" (R. p. 312). On direct examination respondent testified that on the 31st day of December (the day before he was injured) that what was on the lead "was mostly oil—water and oil; there wouldn't be much mud mixed in" (R. p. 235). Throughout his testimony, respondent complained that he slipped in oil, not mud, and on cross-examination, when asked whether there was any mud at the place where he slipped he replied, "There could have been just a little bit, * * *" He further said the ground was not "very soft"; that "it was pretty cool" that morning (R. p. 281). On redirect examination respondent testified that he slipped when he stepped "in the oil and slush" (R. p. 318) and on recross-examination that "it looked like crude oil to me, something that they burn in the engines" (R. p. 319).

The ambulance driver who responded to the call after respondent's injury, and who, with the assistance of a helper removed respondent from the scene of the accident, testified "It was a cold morning and the ground seemed pretty firm to me" (R. p. 320). The Government Meteorologist in charge of the Weather Bureau at Shreveport testified to weather conditions and temperature readings (R. pp. 341-346), and testified that in his opinion "the ground would be pretty hard" at the time and place of the accident (R. p. 347).

It was not petitioner's contention in the Court of Appeals, and it is not his contention here, that respondent did not make a case for the jury. It is admitted that his own testimony was sufficient to take the case to the jury, and that if the jury saw fit to believe his testimony, and to disbelieve the testimony of petitioner's witnesses, the

jury would have been warranted in returning a verdict in favor of respondent. However, it was petitioner's contention in the District Court and in the Court of Appeals, and it is his contention here, that he did not have a fair trial in the District Court, but that by reason of the admission of the incompetent evidence here complained of, and by reason of the construction placed thereon by respondent's counsel in his argument, as well as by the District Court in its charge, respondent was in a better position to persuade the jury to grant him a verdict than he would have been without that evidence.

Having that contention in mind, and with further reference to the emphasis placed on the testimony of the two conductors by respondent's counsel in his argument to the jury, it should be noted that immediately after counsel had reviewed the testimony of the two conductors, he said, "Now, going through those witnesses, let me ask you which ones, which witnesses in this case, have the better opportunity to know the facts, and to know whether they had good, sound, and safe footing down there, or whether it was slippery and dangerous?" (R. p. 570.)

The District Court, in its charge to the jury said, "If the Court shall make a mistake in the law as it is given to the jury, then that error may be corrected in another court, in the court above and superior in authority to this Court," and, after telling the jury that "The issues in this case are rather sharply drawn," told them "it is your function and your responsibility to determine what the facts are. You should, of course, try the case and determine it upon the evidence which has come to you from this witness stand" (R. p. 624), including, of course, the testimony of Stout, and of Boothe and Staffa. The District Court further told the jury that if they should find "from the preponderance or greater weight of the evidence" (R. p. 627) that "the defendant carelessly and negligently permitted oil and mud to accumulate in and about the

place where this plaintiff was working, * * * and caused the place to be unsafe for this plaintiff and that, as a result thereof, this plaintiff slid and was caused to fall under the train, then it would be your duty to find a verdict for the plaintiff" (R. p. 628).

Petitioner makes no criticism of the Court's charge. As a matter of law, the charge was correct. However, the quoted excerpts from the charge are here set out to emphasize petitioner's contention that the jury was permitted by the Court to consider the evidence of respondent's witnesses Stout, Boothe and Staffa, after respondent's counsel had referred to the testimony of those witnesses as constituting the "overwhelming preponderance of the evidence" in his favor, and furthermore, that telling the jury that if the Court "shall make a mistake * * * that error may be corrected in another Court * * * superior in authority to this Court," would have a tendency to make the jury more apt to decide in favor of a man who was injured so pitifully as respondent in this case was injured.

There cannot be much question but that the testimony of all three witnesses here mentioned was incompetent. And there can be no question but that the testimony of Boothe and Staffa was incompetent. The Court of Appeals found it was incompetent, and not only said in its opinion that "It might have been better to have excluded the testimony of the conductors" (R. p. 655 Original, p. 654 other copies), and said that their testimony related to "a material fact," but said, "We are reluctant to reverse a judgment for admission of incompetent evidence of a material fact otherwise proven" (R. p. 656 Original, p. 654 other copies). As a matter of fact, there was no other satisfactory evidence to prove what the opinion of the Court of Appeals referred to as "the material fact to which this evidence related." As has already been seen, no witness, save and except respondent, testified that any oil

was present on the lead at the time, and at the place, where he was injured. And petitioner produced four witnesses, of whom at least three were completely disinterested, who testified to facts which would justify a finding that respondent did not slip on oil, but fell when his coat or some part of his clothing caught on a railroad car and jerked him from his feet.

II.

CONCLUSION.

The question here presented with reference to whether prejudice results from the admission of incompetent evidence, such as that complained of, is one that has arisen numerous times, and it appears from the decisions of this Court, as well as from prior decisions of the Circuit Court of Appeals for the Eighth Circuit, and of other Circuit Courts of Appeals and State Courts, that it is reversible error to admit such evidence in cases arising under the Federal Employers' Liability Act.

Petitioner submits that if the decision of the Court of Appeals in this case is permitted to stand, he will suffer an irreparable and unwarranted injury, and confusion will result from the decision.

Petitioner, therefore respectfully prays that his petition for certiorari be granted to the Eighth Circuit Court of Appeals and that the judgment of that Court be reversed.

WAYNE ELY,
Solicitor for Petitioner.

A. H. KISKADDON,
Of Counsel.

Wayne Ely, Solicitor for Plaintiff, certifies that the foregoing petition for certiorari is filed in good faith and is believed to be meritorious.

Dated at St. Louis, Missouri, this 31st day of August, 1946.

Wayne Ely.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 462

BERRYMAN HENWOOD, Trustee of the St. Louis Southwestern Railway Company, a Corporation,
Petitioner,

vs.

O. R. CHANEY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI.

WILLIAM H. DEPARCQ,
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Of Counsel.

Hayward-Court Brief Printing Co., Minneapolis 15, Minn.

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CASES CITED

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RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING CERTIORARI.

I.

PRELIMINARY STATEMENT.

(Figures in parentheses refer to pages of the printed record.)

This is a petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above case on July 12th, 1946.

The absence of any attempt in petitioner's brief to review the evidence fairly and impartially necessitates an additional statement, which, avoiding repetition, will be supplementary only. Petitioner's brief is characterized by an omission of vital and determinative facts; only the evidence favorable to the petitioner has been select-

ed for emphasis. Conflicting evidence has been ignored.

It seems that the defeated advocate is chronically unable to review the evidence in its aspects favorable to the successful adversary and petitioner's counsel is no exception. Construed favorably to respondent the evidence presents the following picture:

II.

STATEMENT OF FACTS.

This accident occurred in the railroad yard operated by the petitioner at Shreveport, Louisiana. One of the tracks in that yard is called the "lead track" which extends in a northerly and southerly direction. Most of the switching of cars in the yard is done on the lead track, and the switchman who acts as "pin-puller" performs practically all of his work north of the switch mentioned in the evidence as the T. & N. O. mainline switch.

Respondent had worked for petitioner as a switchman since 1937 (R. 225). He had just gone to work the morning of the accident at 8:00 a. m. (R. 226). He was the pin-puller on that job (R. 226). Respondent was working on what is known as an "inside lead" (R. 226). On an inside lead you have to continuously cross over tracks, rails and switch ties to pull the pins (R. 226). When a pin drops a pin-puller has to run along by the cars and try to pull it again (R. 37, 82). At the time of the accident the engine was headed north (R. 221). In cutting off cars they would kick them south (R. 227).

The movement upon which the accident occurred was pretty close to the first movement that morning (R. 237). It was a movement of 15 or 18 cars and he got a signal that there would be two cars to cut off and he

got on and rode (R. 237). He was then on the east side of the lead (R. 237). He rode the cut until it came to a stop (R. 238). He then got off on the ground (R. 238). Someone lined the switch while he waited (R. 238). The foreman gave a kick signal and he pulled the pin (R. 238). When he first pulled the pin he was on the east side of the lead just beyond the T. & N. O. mainline, thirty or forty feet (R. 238). That was a car length north of the frog (R. 238). He pulled the pin on the caboose (R. 239). He pulled the pin and stepped away from it and it went just a few feet and he heard the pin fall (R. 239). He took out after the cars and was going to pull the pin again (R. 239). He ran alongside the car and tried to get the pin to come up and stay up (R. 241). It worked pretty hard (R. 241). He was running along the side of the cars trying to pull up the pin when he slipped on the oil and slush and fell underneath the cars (R. 241). The oil and slush caused him to fall (R. 242). At the time he fell he was running and jerking and pushing at the pin lift lever trying to get the pin to come up (R. 242). At the time he slipped he was two and one-half cars north of the T. & N. O. mainline switch (R. 242). When he slipped he fell backwards and his right arm and right leg fell under the cut of cars (R. 243). He was shoved along down the rails (R. 244). He eventually cleared himself (R. 244).

From the time respondent first went to work until the date of the accident the condition of the lead had remained practically the same (R. 228). He noticed oil along the lead for the last couple of years from time to time (R. 228). Conditions kept getting worse all the time and more oil accumulated (R. 229). Most of the oil came from Cotton Belt engines (R. 229, 230). He

saw them leaking oil (R. 230). No walkway was ever built since he had been there (R. 231). He had dug little trenches himself to try to improve the footing (R. 234) on several occasions. It was usually a mixture of oil and water (R. 235). Just a few days before the accident he had burned some of the oil off (R. 235).

Respondent produced evidence that for years oil was present in such amounts all up and down the lead as a continuing condition that it created an unsafe place to work. Witnesses for both respondent and petitioner corroborated the testimony of respondent as to the condition existing along the lead.

R. A. Mayberry testified for respondent that he had been familiar with the locality since 1936 (R. 35). Footing was bad ever since he had been there (R. 38). The lead was in an unsafe and dangerous condition at the time of the accident (R. 40). He had complained of conditions to the general yardmaster, Mr. J. E. Irvine (R. 40). He noticed at the place where Chaney was injured that there was a pile of mud, dirt, oil and water mixed with bones and blood (R. 68). He noticed the footing there was slippery (R. 68).

W. T. Arnold, switchman for petitioner, testified there was oil all up and down the lead (R. 85, 101). That it was thicker in some places than in others (R. 85). This condition existed all through 1942, 1943 and 1944 and in 1944 there was more oil (R. 87). Much of the oil came from Cotton Belt engines (R. 87). At the time of the accident and immediately before footing was slippery (R. 91). He complained to Engine Foreman McAllister around in October (R. 92). He actually saw the engines leaking oil from time to time (R. 103).

J. C. Stout testified that all up and down the lead track the lead would be muddy and oily and slippery (R.

134). There was oil all up and down the lead (R. 134). Six weeks before the accident he took an engine into the roundhouse that was leaking oil (R. 134). Two or three weeks before Chaney's accident he slipped and fell on slick mud and oil (R. 139, 140). He complained of the slick and slippery lead to Mr. McAllister and Mr. King (R. 150).

C. T. Alexander was the foreman on Chaney's crew the morning of the accident (R. 183). He saw engines leaking oil for a period of two weeks to a month and a half before the accident (R. 186). He had seen oil on the lead (R. 187). He complained of one of the engines leaking oil to the roundhouse foreman (R. 189). The lead was slippery (R. 190).

W. J. Faircloth testified that the lead was wet and slick from oil and water (R. 195). That was true ever since he had worked there (R. 195). He had seen oil leak from other engines (R. 196). He complained to one of the yardmasters (R. 198). The morning after the accident he looked at the condition of the lead and it was wet and slippery (R. 195).

Troge T. Boothe testified that five or six weeks prior to this accident he slipped by reason of oil along the lead (R. 309). He made a written notation of this accident and it was November 23rd, 1944 (R. 309). The cause of his slipping was oil and water along the lead (R. 310).

A. H. Staffa testified the lead in 1944 was slippery from water, oil and muck (R. 312). In the spring of 1944 he slipped because of oil and muck and fell on the lead track (R. 312, 313).

W. M. Webb testified that he saw oil up against the rail all up and down the lead (R. 316, 317). He testified

that he reached Chaney right after the accident and Chaney said, "My foot slipped on the slick ground" (R. 316).

E. M. Robinson, engine foreman for the petitioner, had been eleven years in the Shreveport Yard (R. 364). He was out on the lead the morning the accident happened and saw oil there (R. 369, 370).

Tom Smith, petitioner's switchman, testified he saw oil on the lead (R. 426, 427).

R. E. Prudhomme, switchman for petitioner since 1918, testified that the ground was soft and muddy and there was oil on the lead (R. 439). He showed Mr. Pettigrew, the general superintendent, the condition of the lead out there several months before the accident (R. 440). He complained of slippery footing (R. 442).

J. J. Rains, another of petitioner's witnesses, testified the ground was muddy (R. 454). He saw oil right where Chaney got hurt mixed with mud and water (R. 454, 463).

W. E. Breuning, general foreman for petitioner, produced the locomotive inspection reports for the month of December, 1944 (R. 500). The reports showed complaints of oil dripping on December 12th (R. 505), December 17th (R. 505) on Engine 517. On Engine 518 there was oil leaking on December 12th (R. 506). Engine 520 was turned in December 12th with leaking oil (R. 506). The same engine was turned in on December 14th (R. 507). He brought only the reports for the month of December and could not say as to what the records might show for previous months (R. 515).

No witness testified that Chaney conducted himself in attempting to pull this pin in anything but the usual and customary manner.

POINTS AND AUTHORITIES.

A. The trial court committed no error in the admission of testimony and the evidence is sufficient to sustain the verdict.

Bailey v. Central Vermont Railway Co., 319 U. S. 350, 63 S. Ct. 1062.

Lowden v. Hanson, 134 F. (2d) 348.

1. Evidence as to prior injuries and falls at about the same place and under similar conditions was properly admitted.

20 *Am. Jur. on "Evidence,"* page 282, Sec. 304.

Evans v. Erie R. Co., 213 F. 129 (6 C. C. A.).

Benner v. T. R. R. A. of St. Louis, 348 Mo. 928, 156 S. W. (2d) 657, cert. den. 315 U. S. 813, 62 S. Ct. 798.

Charlton v. St. Louis & San Francisco R. Co., 200 Mo. 413, 98 S. W. 529.

T. & P. Ry. Co. v. Watson, 190 U. S. 287, 23 S. Ct. 681.

District of Columbia v. Armes, 107 U. S. 519, 2 S. Ct. 840.

Cropper v. Titanium Pigment Co., 47 F. (2d) 1038 (8 C. C. A.).

Illinois Central R. Co. v. Sigler, 122 F. (2d) 279 (6 C. C. A.).

128 *A. L. R.* 599.

45 *C. J.* 1246, Sec. 811.

1 *Greenl., Evidence,* Sec. 51A.

2 *Jones, Commentary on Evidence,* 2nd Ed., 1265.

Chicago Great Western Railway Co. v. Beecher, 150 F. (2d) 394.

Palmer, et al., v. Hoffman, 318 U. S. 109, 63 S. Ct. 477.

Vicksburg & Meridian R. R. Co. v. Putnam, 118 U. S. 545, 7 S. Ct. 1.

Texas & Pacific Ry. Co. v. Rosborough, etc., 235 U. S. 429, 35 S. Ct. 114.

Oklahoma Natural Gas Co. v. Ross, 131 F. (2d) 238.

George v. City of Los Angeles, 51 Cal. App. (2d) 311, 124 Pac. (2d) 872.

80 *A. L. R.* 446.

Wigmore on Evidence, 2nd Ed., Secs. 252, 458.

2. The admission of improper evidence is harmless error when the verdict or judgment is supported by sufficient and competent evidence.

Gillespie v. Collier, 224 F. 298.

M. K. T. Ry. Co. v. Elliott, 102 F. 96, aff'd 184 U. S. 695, 22 S. Ct. 937.

St. Louis & San Francisco R. Co. v. Duke, 192 F. 306.

Meeker v. Lehigh Valley R. Co., 236 U. S. 434, 35 S. Ct. 337.

Holmes v. Goldsmith, 147 U. S. 150, 13 S. Ct. 288.

Atlantic Coastline R. Co. v. Smith, 135 F. (2d) 40.

Southern Ry. Co. v. Wood, 116 F. (2d) 274.

Bristol Gas & Elec. Co. v. Boy, 261 F. 297.

L. & N. R. Co. v. Summers, 125 F. 719, cert. den. 192 U. S. 604.

New York, etc., R. Co. v. Winters, Admr., 143 U. S. 60, 12 S. Ct. 356.

Schwarz v. Fast, 103 F. (2d) 865.
Spotts v. Baltimore & Ohio R. Co., 102 F. (2d) 160, cert. den. *B. & O. R. Co. v. Spotts,* 307 U. S. 641, 59 S. Ct. 1039.
C., B. & Q. R. Co. v. Dawson, 245 F. 338.
U. S. v. Becktold Co., 129 F. (2d) 473.
Lavender v. Kurn, et al., ... U. S. ..., 66 S. Ct. 740, decided March 25th, 1946.

III.

ARGUMENT.

A. The trial court committed no error in the admission of testimony and the evidence is sufficient to sustain the verdict.

A discussion of authorities is unnecessary for the elementary proposition that it is the duty of a railroad company to furnish to its employees a reasonably safe place in which to do their work. This duty is a continuing one and is non-delegable and extends to all places where the employee may reasonably be expected to go in the course of his work. See *Bailey v. Central Vermont Railway Co.,* 319 U. S. 350, 63 S. Ct. 1062; *Lowden v. Hanson,* 134 F. (2d) 348.

1. Evidence as to prior injuries and falls at about the same place and under similar conditions was properly admitted.

Under the great weight of authority in this country evidence as to prior injuries at about the same place and under similar conditions is considered proper testimony. The applicable rule is well stated in 20 *Am. Jur. on "Evidence,"* page 282, Sec. 304, wherein it is stated:

"It is recognized in numerous cases that for certain purposes at least, evidence of other similar accidents or injuries at or near the same place or by the use of the same appliance suffered by persons other than the plaintiff and in other and different times, not too remote in point of time from the particular occurrence, is admissible."

In *Evans v. Erie R. Co.,* 213 F. 129 (6 Cir.), the court in discussing a crossing accident stated:

"* * * The rule is well settled in the Federal courts that testimony of other accidents in the same place is admissible not only to show the dangerous character of the place, but also that knowledge thereof was brought to the attention of those responsible therefor. The alleged dangerous character of the crossing would naturally affect the question whether a given speed was negligence or not, as well as whether gates or flagmen were reasonably necessary. In *District of Columbia v. Armes,* 107 U. S. 519, 525, 2 S. Ct. 840, 845 (27 L. Ed. 618), which was an action for injuries by reason of a defective sidewalk, Mr. Justice Field said, 'the frequency of accidents at a particular place would seem to be good evidence of its dangerous character—at least it is some evidence to that effect, * * * besides this, as publicity was necessarily given to the accidents, they also tended to show that the dangerous character of the locality was brought to the attention of the city authorities.'

"In *Chicago and North Western Railway Company v. Netolicky* (C. C. A. 8 Cir.), 67 F. 665, 672, 14 C. C. A. 615, which was an action against a railway company for damages for an accident at a grade crossing, it was held proper to permit witnesses familiar with the locality to testify to narrow escapes they had had at the same crossing, in connection with the descriptions of the locality, for the purpose of showing the nature of the crossing and the difficulties of travelers in passing over it. In *Patton v. Southern Railway Co.* (C. C. A. 4 Cir.),

82 F. 979, 983, 27 C. C. A. 287, the rule of admissibility of proof of other accidents was applied in the case of the derailment of a train at a sharp curve at the foot of a steep grade. See also, *Smith v. Sherwood Township,* 62 Mich. 159, 165, 28 N. W. 806, where, in an action for negligently permitting a hole to remain in a bridge, at which a horse became frightened, evidence that other horses had shied at the same hole was held admissible.

"We think testimony of accidents at this crossing from Erie southbound passenger trains should have been received, as well as proof of alleged complaints by the public authorities to the defendant subsequent to such accidents relating to the claimed dangerous character of the crossing with the request that gates or watchmen be maintained thereat. We think, also, that testimony of narrow escapes therefrom should have been admitted, so far as testimony should be produced tending to show notice to defendant thereof either by express information or general public notoriety."

In the case of *Benner v. T. R. R. A. of St. Louis,* 348 Mo. 928, 156 S. W. (2d) 657, cert. den. 315 U. S. 813, 62 S. Ct. 798, there was an action brought under the Federal Employers' Liability Act. The deceased was killed as a result of a shock while using defendant's phone. Evidence that another employee had received a shock on the same phone both before and after the accident was admitted. On appeal the Missouri Supreme Court said:

"Defendant also complains of the admission of evidence that the witness Kroeck received a shock on this telephone on the same evening as the accident to decedent, *and again a few months later.* It is true that ordinarily such evidence of other accidents is not admissible because it tends to introduce issues confusing to the jury. But such evidence is admissible in the discretion of the trial judge where it shows or tends to show the condition of a

mechanism or instrumentality to be such that accidental injury could be caused by its use * * *. It is, of course, necessary to show that the condition of the instrument involved was the same at the time of the different occurrences proven, but such proof was here made. We think that the trial judge did not abuse his discretion in admitting this evidence." (Emphasis ours.)

In the case at bar it was shown that the accidents happened at or very near the same place and occurred because of similar conditions of oil and slippery footing (R. 136, 140, 152, 202, 203, 309, 310, 312, 313).

In *Charlton v. St. Louis & San Francisco R. Co.*, 200 Mo. 413, 98 S. W. 529, plaintiff was knocked from a box car by a water crane too near the track. Offered testimony of another witness that the same crane had hit his arm some time before the accident was excluded. In reversing the trial court, the Missouri Supreme Court said:

"Mr. Logue was a witness for plaintiffs. He had been a brakeman, working on defendant's road, and was familiar with the crane. He never measured its distance from the car, but knew that it brushed his arm once in passing. This evidence was excluded. We think it competent proof. It tended to show the nearness of the crane and its appendages, and hence the incident dangers. If the witness assumed an unnatural and unnecessary position when brushed by the crane, that was a matter to be developed by cross examination. The prima facie presumption was that he was exercising due care and was in a usual attitude, and it developed on defendant to overthrow this presumption. Furthermore, that accidents have theretofore happened under the same conditions at a given spot from the same cause seems competent proof. * * *"

Plaintiff showed that the prior accidents occurred under the same or similar circumstances and at or near the same place. Defendant now claims there were distinguishing circumstances. Such fact should properly have been brought out on cross examination. Further authorities to the effect that evidence of prior and similar accidents is admissible are *T. & P. Ry. Co. v. Watson,* 190 U. S. 287, 23 S. Ct. 681; *District of Columbia v. Armes,* 107 U. S. 519, 2 S. Ct. 840; *Cropper v. Titanium Pigment Co.,* 47 F. (2d) 1038 (8 C. C. A.); *Illinois Central R. Co. v. Sigler,* 122 F. (2d) 279 (6 C. C. A.); 128 *A. L. R.* 599; 45 *C. J.* 1246, Sec. 811; 1 *Greenl., Evidence,* Sec. 51A; 2 *Jones, Commentary on Evidence,* 2nd Ed., 1265.

Under Rule 43-a of the Rules of Civil Procedure, the admissibility of evidence is governed by the rule applied in federal courts or in the courts of the state in which the federal court sits, whichever favors its reception. Rule 43-a has been followed and applied in *Chicago Great Western Railway Co. v. Beecher,* 150 F. (2d) 394, and also by the Supreme Court of the United States in *Palmer, et al., v. Hoffman,* 318 U. S. 109, 63 S. Ct. 477.

Respondent might state in passing that it has been universally held that evidence of prior conditions and accidents is admissible where it relates directly to the instrument or place in question. See *Vicksburg & Meridian R. R. Co. v. Putnam,* 118 U. S. 545, 7 S. Ct. 1; *Texas & Pacific Ry. Co. v. Rosborough, etc.,* 235 U. S. 429, 35 S. Ct. 114; *Oklahoma Natural Gas Co. v. Ross,* 131 F. (2d) 238; *George v. City of Los Angeles,* 51 Cal. App. (2d) 311, 124 Pac. (2d) 872; 80 *A. L. R.* 446; *Wigmore on Evidence,* 2nd Ed., Secs. 252, 458.

However, the question of whether this evide ence was properly admitted or not is purely an academic one because there was more than sufficient evidence to sustain the verdict in this case, and under those circumstances this court will not review the evidence.

2. The admission of improper evidence is harmless error when the verdict or judgment is supported by sufficient and competent evidence.

Assuming solely for the purpose of argument that petitioner is correct in his contention that certain improper evidence was admitted, it appears conclusively that the admission of any such evidence was harmless and without prejudice to the petitioner and that there is more than sufficient competent evidence to sustain the verdict. It is universally held that where the party in whose favor judgment was rendered is entitled to recover, a judgment will not be reversed because of the admission of improper evidence.

In *Gillespie v. Collier,* 224 F. 298, the court stated as follows:

> "A witness for the plaintiff was allowed to testify, over objection, to the defective condition of the throttle, as disclosed by an examination about thirty-five days after the accident. Some time after the accident, but just how long does not appear, the engine was put out of use, and was not again employed before the witness took the throttle off and inspected it, and the rule is that, upon an issue as to the condition of machinery or appliances at the time of an injury, evidence of a defective condition at a later time is inadmissible, without proof from which a reasonable inference may be drawn that there has been no substantial change. *But the other evidence in the case showed so clearly the throttle was defective and leaked steam, and com-*

plaint of it had been made on that ground, that we think no prejudice resulted from the testimony of the witness. * * *." (Emphasis ours.)

Viewing the evidence in the light most favorable to respondent, it appears conclusively that there was substantial and overwhelming competent evidence to the effect that the so-called "inside lead" where the respondent was injured was slippery and unsafe from oil both at the time of the accident and for a long time prior. The unsafe and slippery footing was testified to by the witnesses R. A. Mayberry (R. 38, 39, 40, 41), W. T. Arnold (R. 85, 87), J. C. Stout (R. 134), W. J. Faircloth (R. 195, 197), C. T. Alexander (R. 184, 186, 190), E. M. Robinson (R. 369, 370), Tom Smith (R. 426, 427), R. E. Prudhomme (R. 439), J. J. Rains (R. 454, 461), J. J. Poe (R. 364), S. S. Barker (R. 436, 437), and the respondent.

The petitioner does not dispute the evidence of any of these witnesses that the footing was slick and slippery. He does not anywhere in his brief before this court or the lower court make any claim of impropriety as to the testimony of Alexander, Robinson, Tom Smith, Prudhomme, Rains or the respondent. The court should note particularly the testimony of E. M. Robinson, a witness produced by the petitioner. On pages 369 and 370 of the record, Robinson testified as follows:

"Q. (By Mr. DeParcq) As a matter of fact, Mr. Robinson, in working there that morning, right near where Chaney had been injured, you noticed oil, didn't you?

A. Yes, there was oil there.

Q. Then, as a matter of fact, along there where Chaney was hurt, that lead to the area where they walked, was in a slick and slippery condition?

A. Yes.

Q. Now, isn't it true, Mr. Robinson, that for some time previous to this accident there had been an engine up along there leaking oil?

A. I understand there had been.

Q. Well, when you say you understand, is that something you know from having worked there and having observed it?

A. Well, you could see along the lead, the middle of the track, where the oil had been leaked.

Q. Now, was that crude oil and very slippery?

A. Well, I have an idea it was various kinds of oil, because there were quite a number of cars moving through the yard daily.

Q. Now, isn't it a fact that at the time of this accident and before, in some places in the yard, there were large puddles of oil between the rails and outside the rails?

A. Well, yes, that was water and oil, where water had accumulated with the oil.

Q. And isn't it a fact that around where Chaney was injured and along the whole lead there was quite a bit of oil?

A. Yes, there was.

Q. And that made the ground slippery and hard to work on, especially after a rain, didn't it?

A. Yes, sir, it did.

Q. As a matter of fact, that condition could have been remedied by putting some gravel on those slippery places?

A. I think so, yes.

Q. Now, no gravel had been put on those places for quite some time before Chaney's accident?

A. Not a regular surface of gravel down, no, that I know anything about."

Robinson was petitioner's own witness as were Mr. Prudhomme and Mr. Rains who also testified to the same condition (R. 438, 439, 440, 454, 463). Many of the witnesses testified that the bad conditions had been brought to the attention of the managing officers of petitioner.

The fact was testified to by Mayberry (R. 40), Arnold (R. 92), Stout (R. 150), Boggs (R. 159, 160, 161), Alexander (R. 198) and Prudhomme (R. 440). Regardless of the fact that counsel contends that certain testimony was improperly admitted, there was more than sufficient substantial evidence to sustain the verdict. Petitioner does not at any time claim that the testimony as rendered by Alexander, Webb, Smith, Robinson, Rains or respondent was anything but proper. Yet all of these witnesses testified that the lead in question was soaked in oil and was very unsafe and dangerous. Robinson, Prudhomme, Smith and Rains were the petitioner's own witnesses. In *M. K. T. Ry. Co. v. Elliott,* 102 F. 96, aff'd 184 U. S. 695, 22 S. Ct. 937, it is stated:

> "The admission of incompetent evidence of a material fact is an error without prejudice, where the fact is proved by other competent evidence. * * *."

In *St. Louis & San Francisco R. Co. v. Duke,* 192 F. 306, it was said:

> "* * * The admission of improper evidence over objection to establish facts proved by other evidence introduced without objection is harmless error. * * *."

Other authorities to the effect that where there is substantial competent evidence to support a verdict, the admission of improper evidence is harmless are: *Meeker v. Lehigh Valley R. Co.,* 236 U. S. 434, 35 S. Ct. 337; *Holmes v. Goldsmith,* 147 U. S. 150, 13 S. Ct. 288; *Atlantic Coastline R. Co. v. Smith,* 135 F. (2d) 40; *Southern Ry. Co. v. Wood,* 116 F. (2d) 274; *Bristol Gas & Elec. Co. v. Boy,* 261 F. 297; *L. & N. R. Co. v. Summers,* 125 F. 719, cert. den. 192 U. S. 604.

It is elementary and fundamental that a verdict rendered on conflicting evidence will not be disturbed. See

New York, etc., R. Co. v. Winters, Admr., 143 U. S. 60, 12 S. Ct. 356; *Schwarz v. Fast*, 103 F. (2d) 865; *Spotts v. Baltimore & Ohio R. Co.*, 102 F. (2d) 160, cert. den. *B. & O. R. Co. v. Spotts*, 307 U. S. 641, 59 S. Ct. 1039; *C., B. & Q. R. Co. v. Dawson*, 245 F. 338.

In *Spotts v. Baltimore & Ohio R. Co.*, cited *supra*, the court said:

> "* * * Nor can we say that, as a matter of law, the contradictory evidence offered by defendant showed that plaintiff's testimony cannot be true. A contention for such action is an appeal to us to weigh the conflicting evidence in the light of probabilities and thus to invade the exclusive province of the jury, and, on the application for a new trial, of the trial judge. This we may not do * * *."

In the case at bar there is an overwhelming mass of testimony to sustain the verdict regardless of whether the court should hold the testimony of certain witnesses incompetent. Any fair and impartial reading of this record will prove conclusively to this court that respondent here was forced to work along a lead track beside which the ground was saturated with oil, water, mud and slush in such manner that it was extremely unsafe and dangerous for the well-being of the employees. It cannot be said that any evidence adduced at said trial whether improper or not was prejudicial to the petitioner in the light of the overwhelming amount of undisputed evidence by innumerable witnesses as to such dangerous and unsafe conditions that were in existence not only at the time of the accident, but for a long time before.

Respondent in this case suffered the loss of an arm and a leg and the moderate verdict of $67,000.00 should more than convince this court that the jury could not have

been influenced by any sympathy or prejudice resulting from the admission of any so-called incompetent testimony.

Petitioner's theory that the accident was caused because Chaney wore too much clothing that morning was completely blasted. Their main witness on this point was Bill Cole. He saw the accident happen (R. 375). He say Chaney's coat fly (R. 375). However, he would not swear Chaney's coat caught on a car (R. 376). He could not say whether Chaney slipped, stumbled or fell (R. 376). He does not know if the wind blew Chaney's coat or if it caught (R. 376). He did not know the cause of the accident (R. 383). He would not say Chaney's coat got caught (R. 386). His testimony as to not seeing oil and as to good footing was impeached by his own statement (R. 386, 387, 388, 392 and 393). It must be remembered that the first statement from respondent was made right at the scene of the accident when he said to W. M. Webb (R. 316): "My foot slipped on the slick ground."

Whether prejudice results from erroneous admission of evidence is not to be determined abstractly, but depends upon the practical effect as viewed in the light of the trial as a whole. See *U. S. v. Becktold Co.,* 129 F. (2d) 473.

The request of petitioner for a writ of certiorari is beautifully answered in the recent decision of *Lavender v. Kurn, et al.,* . . . U. S. . . . , 66 S. Ct. 740, decided March 25th, 1946, wherein Justice Murphy, speaking for this court, said:

> "* * * *Rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in actions under the Federal Employers' Liability Act. But inasmuch as there is adequate sup-*

port in the record for the jury's verdict apart from the hearsay testimony, we need not determine whether that discretion was abused in this instance." (Emphasis ours.)

CONCLUSION.

The Supreme Court of the United States has emphatically stated that the court should not deprive an injured employee of a jury trial "in a close or doubtful case." The modern trend is well illustrated by the following decisions: *Tiller v. Atlantic Coastline R. Co.*, 318 U. S. 54, 63 S. Ct. 444; *Bailey v. Central Vermont Ry. Co.*, 319 U. S. 350, 63 S. Ct. 1062; *Owens v. Union Pacific R. Co.*, 317 U. S. 715, 63 S. Ct. 1271; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 64 S. Ct. 409.

A reversal of this case upon purely technical grounds would be a tragedy from the standpoint of respondent, whose injuries were so serious and permanent that they were not questioned at any stage of the proceedings. The evidence petitioner furnished an unsafe place to work is so overwhelming that this appeal appears wholly lacking in merit. We submit that in furtherance of justice, this court should deny the petition for writ of certiorari and uphold the judgment of the court below.

Respectfully submitted,

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